LYMAN N. PRICE
v.
VETERANS ADMINISTRATION

DOCKET NO.
CH07528110144

OPINION AND ORDER

Lyman N. Price (appellant) was removed from his GS–11 position of Personnel Management Specialist with the Veterans Administration (agency) on nine charges and consideration of his past disciplinary record. Appellant petitioned the Board's Chicago Regional Office for appeal of his removal. The presiding official official designated by the Board to hear this case sustained five of the nine charges against appellant,[1] found that appellant's removal would promote the efficiency of the service, and held that there was no merit to appellant's affirmative defenses of procedural error, discrimination, disparate treatment, and prohibited personnel practices.[2] Appellant has now petitioned the Board for review of the initial decision. The petition for review is GRANTED under 5 U.S.C. § 7701(e) (1).

Appellant's first contention is that the presiding official erred in not reviewing the merits of each of the past disciplinary actions which were considered in the present removal action. In *McConnell v. Navy*, 8 MSPB 388 (1981), the Board stated a three-part test for the unchallenged consideration of past disciplinary actions. The three elements of the test are that: (1) the employee must have been informed of the action in writing; (2) the action must be a matter of record; and (3) the employee must have been permitted to dispute the

[1]The five charges sustained by the presiding official are as follows: Charge 1, participating in the internal affairs of a labor union and thereby creating a conflict of interest with his duties as a Personnel Management Specialist; Charge 2, making slanderous and defamatory statements regarding the President of the union local; Charge 5, deliberate refusal or unreasonable delay in reviewing supervisor's records and establishing individual training programs for supervisors; Charge 6, deliberate refusal to carry out a proper order or willful resistance to same in certifying an invoice for training courses after being told both orally and in writing not to do so; Charge 9, deliberate failure or unreasonable delay in carrying out instructions by failing to bring an appraisal program up to date when requested.

[2]The agency originally proposed appellant's removal to be effective on December 28, 1979. At that time, however, a lawsuit by appellant was pending against the agency. In that lawsuit, appellant charged the agency with discrimination in actions not on appeal here. By a stipulation entered into between appellant and the agency on December 28, 1979, appellant's removal was held in abeyance until the law suit was resolved. On November 17, 1980, the Court issued an opinion in which the judge found no merit to appellant's allegations. *Price v. Cleland*, Case No. C78–550, slip op. (U.S.D.C. N.D. Ohio, Nov. 17, 1980). The following day the agency effected appellant's removal.

action to a higher authority. The presiding official declined to review the prior actions because the elements of the three-part *McConnell* test had been met. Initial Decision at 10. We find that the presiding official erred in not affording appellant a limited review of the prior disciplinary actions against him which he challenged on appeal. *Bolling v. Department of the Air Force*, 8 MSPB 658, 660 (1981). This error is remedied, however, by the Board's review of the prior actions upon petition for review. In so doing, we are not left with the "definite and firm conviction that a mistake has been committed." *Id.* at 660.

Appellant's second contention is that the presiding official erred in allowing the agency to submit its adverse action file for appellant's removal more than fifteen days after his appeal was filed, in contravention of the Board's regulatory time limits. 5 C.F.R. § 1201.22. We find no error in this regard. The agency's submission on January 30, 1981, was filed in response to an order from the presiding official issued on January 14, 1981. The Board has held that the decisions of our presiding officials will not be reversed merely on procedural grounds where the parties are unable to show how the deviation from requisite procedures affected their substantive rights. *Karapinka v. Department of Energy*, 6 MSPB 114, 115 (1981). Appellant has failed to show how his substantive rights were affected by this decision of the presiding official.

Appellant's third argument is that the agency's removal file is far too voluminous, containing five hundred and sixty-seven pages of material, to have been read by the presiding official. In addition, appellant contends that four hundred and seven pages added to the file by the agency consisted of "unnumbered trash." Upon surveying the record on appeal, we find no error on the part of the agency in including all relevant documents in the removal file. In addition, we have no basis for concluding that the presiding official's well-reasoned initial decision was prepared without a thorough reading and analysis of the entire file.

Appellant's fourth claim of error relates to the fact that the agency removed him on December 13, 1979, and on the same day, granted him a within-grade salary increase. It is appellant's contention that these two actions are inconsistent. We disagree. The procedures regarding the award of a within-grade salary increase are substantively different from the procedures and requirements for removing an employee for misconduct. The fact that appellant was performing his duties at an acceptable level of competence for purposes of receiving a within-grade salary increase under 5 C.F.R. § 531.404 is irrelevant to his removal for misconduct under 5 C.F.R. § 752.301.

Appellant's fifth contention is that the presiding official was biased in favor of the agency. In support of this allegation, appellant

cites a letter dated February 6, 1981, from the presiding official to both appellant and the agency's representative requesting final submissions of information from the parties prior to the closing of the record. This was done to ensure that the record would be complete in view of the fact that the parties waived a hearing in this appeal. The presiding official stated in her letter that, while she was suggesting matters the parties might address, they were free to present whatever evidence they believed would support their case. Since the presiding official treated both parties exactly alike in the February 6, 1981, letter, we are unable to discern any bias on her part.

Appellant's sixth allegation of error relates to the presiding official's finding that his notice of removal was issued on December 13, 1979. Appellant contends the notice was actually issued the next day. In support of this contention, appellant submitted the notice, which bears the printed date of December 13, 1979, and the hand written note in the lower right-hand corner stating that it was issued to appellant on December 14, 1979, at 3:05 p.m. We find that the printed date on the notice is the official date of its issuance, regardless of the date appellant actually took receipt of it. Appellant contends the agency changed deciding officials between December 13 and 14, 1979, in that another official replaced the deciding official in his position with the agency on the 14th, but the Board's finding that the letter was officially issued on December 13, 1979, renders this contention meritless. There was only one deciding official.

Appellant's seventh contention is that his removal was procedurally deficient in that his removal was effected on November 17, 1980, some ten months after his removal was proposed on December 28, 1979. Appellant contends that a new removal notice period should have been initiated prior to November, 1980. We disagree. As the presiding official correctly stated, appellant and the agency stipulated on December 28, 1979, that no action would be effected by the agency until appellant's law suit was resolved in Court.[3] Initial Decision a 11. While appellant may have expected a decision in his case to have been issued by the judge somewhat earlier than November 17, 1980, it is clear that the agency fulfilled its obligation under the stipulation, and that appellant must therefore also be held to the terms he agreed to. Under these circumstances, we find that agency policy regarding the promptness of disciplinary actions was not violated.

Appellant's eighth contention is that the agency erred in taking the present adverse action, as well as prior disciplinary actions, in not first counseling appellant as a first step to improve his conduct or performance. In support of this contention, appellant cites the

[3]*See* footnote 2, *supra*.

Discipline and Adverse Actions section of the agency's internal personnel policies, dated July 11, 1975, which states that it is the agency's policy that counseling shall be the basis for all disciplinary actions, with the exception of serious offenses where an employee should not be given a "second chance." We do no find merit in appellant's claim that he was never provided counseling.

The record on appeal shows that on three occasions prior to the present removal action, appellant received counseling in response to agency concerns regarding his conduct and performance. On August 22, 1978, he received written instruction/review and concurrence, and on September 12, 1978, appellant received a reprimand based on related charges. These past efforts at counseling dispose of appellant's claim that he never received counseling. In any event, we note that the agency's regulations did not obligate the agency to provide counseling to appellant before initiating a removal action. The agency's regulations define a "disciplinary action," for which counseling is required, as "any corrective action up to and including 30 days' suspension." V.A. Personnel Policies, Discipline and Adverse Actions, Section B, part 3 (A). However, the agency's regulations do not require counseling for removal actions, *Id.* at Section C, part 4, and allow removal to be the initial action against an employee in extreme cases such as this. *Id.* at Section G. Therefore, the agency committed no error in proceeding to remove appellant as it did.

Appellant's ninth contention is that the presiding official erred in finding that he had failed to make a *prima facie* showing of discrimination on the basis of race as required by *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). In support of this allegation, appellant has made essentially the same broad and unsupported claims of general discrimination by the agency that were raised before the presiding official.

Appellant did, however, submit as new evidence of racial discrimination, information relating to the removal of other agency employees who were also black and whose treatment, appellant contends, was directly related to race. With regard to the alleged disparate treatment of a black employee named Vaughn Stewart, appellant submits the decision of the agency's Assistant General Counsel on Mr. Stewart's discrimination complaint. In the decision, the deciding official found no discrimination. Appellant contends that the Equal Employment Opportunity Commission found discrimination upon review of this case, but he has proffered no citation or other information that would confirm this. The nine other cases of alleged disparate treatment cited by appellant are equally lacking in factual specificity.

The Board finds that appellant has thus failed to meet his burden of proof in establishing that the action against him was based on prohibited racial discrimination. 5 C.F.R. § 1201.56(b).

Appellant's tenth contention is that his removal was undertaken in reprisal for his "whistleblowing" activities under 5 U.S.C. § 2302(b) (8) (A) (ii). Specifically, appellant refers to a letter he sent to the agency's Inspector General on September 30, 1979, raising his concerns regarding racial tensions at the agency and his perception that the agency was not acting to resolve these alleged racial tensions. The presiding official found that the writing of this letter was a protected activity, but found no causal relationship between the protected activity and the agency's action removing him. Initial Decision at 12. We agree. Thus, appellant's prohibited personnel practice claim of reprisal cannot be sustained under 5 U.S.C. § 2302 (b) (8) and 7701(c) (2) (B).

Appellant's eleventh and final contention is that the agency has failed to prove its charges by the preponderance of the evidence. The Board has reviewed the record on appeal and finds no basis to disturb the presiding official's finding that five of the nine charges against appellant are supported by preponderant evidence. *Weaver v. Navy*, 2 MSPB 297 (1980).

Accordingly, the Board hereby AFFIRMS the initial decision dated April 10, 1981, as MODIFIED above, and SUSTAINS appellant's removal.

This the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to petition the Equal Employment Opportunity Commission to consider the Board's decision on the issue of discrimination. A petition must be filed with the Commission no later than thirty (30) days after appellant's receipt of this order.

Appellant is also hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. Appellants who file a civil action in a U.S. District Court concerning the Board's decision on the issue of discrimination have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived. A civil action to petition for judicial review must be filed in an appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *August 23, 1982*